

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of: :  
: Group Art Unit: 2616  
Jozef Babiarz :  
: Examiner: Raj Jain  
Appln. No.: 10/799,704 :  
: Confirmation No.: 8973  
Filed: March 15, 2004 :  
: Customer No.: 21967  
For: TECHNIQUE FOR END-TO-END :  
: ADMISSION CONTROL OF REAL- :  
: TIME PACKET FLOWS :

Mail Stop AF  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**REQUEST FOR PRE-APPEAL BRIEF CONFERENCE**

Pursuant to the Pre-Appeal Brief Conference Pilot Program announced in the Official Gazette, Applicants hereby request a pre-appeal brief conference in the above-referenced patent application.

The present patent application was filed on March 15, 2004. On October 30, 2007, an initial Office Action was issued rejecting claims 1-5, 7-11, and 14-20 under 35 U.S.C. § 102(b) as being anticipated by Kelly (An ECN Probe Based Connection Acceptance Control Paper) and rejecting claims 6, 12, 13, 21, and 22 under 35 U.S.C. § 103(a) in view of Kelly and Li et al. (U.S. Patent Application Publication No. 2004/0192312). On January 30, 2008, Applicants traversed the rejection of claims 1-23 with arguments and amendments. On March 7, 2008, a telephonic interview was conducted between the Examiner and the undersigned, during which agreement was reached to forward the present application toward allowance. On March 11, 2008, a supplemental amendment was filed in view of the agreement reached between the Examiner and the undersigned in the telephonic interview conducted on March 7, 2008. On April 8, 2008, a final Office Action was issued rejecting claims 1-16, 18-20, 22, and 23 under 35 U.S.C. § 103(a) as being unpatentable over Kelly (An ECN Probe Based Connection Acceptance Control Paper) in view of Jacobs et al. (U.S. Patent Application

Publication No. 2003/0107994) and objecting to claim 17 as being dependent upon a rejected based claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Thus, despite repeated attempts to convince the Examiner that the cited references clearly fail to teach, or even suggest, the claimed invention, and despite the fact that the Examiner previously agreed to allow the claims, the Examiner has maintained the rejection of claims 1-16, 18-20, 22, and 23 which is certain to be overturned on appeal. Rather than spending further time reiterating the same arguments clearly establishing that the cited references fail to teach, or even suggest, the claimed invention, Applicants have elected to pursue the Pilot Program.

As set forth in greater detail in Applicant's response dated March 11, 2008, the cited reference Kelly in view of Jacobs fails to disclose, or even suggest, all the elements set forth in the pending claims.

**I. THE OBVIOUSNESS REJECTION OF CLAIMS 1-16, 18-20, 22 & 23**

Regarding claim 1, the Examiner asserts that Kelly discloses a method for end-to-end admission control of real-time packet flows in a network comprising "determining, at at least one intermediate network element on the network path, at least one flow rate associated with a plurality of packets," as presently claimed. Applicant respectfully disagrees. In contrast, Kelly discloses "sending a series of probe packets from A to B in an attempt to infer the level of congestion." See, e.g., Section 4, paragraph 2, lines 2-4. Accordingly, Kelly appears to be concerned only with sending packets from A to B and not determining at least one flow rate at at least one intermediate network element on the network path. The Examiner relies on the routers within the network as a disclosure of intermediate network elements on the network path. Applicant respectfully submits that Kelly merely discloses that the "probe-based connection acceptance control distributes the admission decision between the routers within the network." See, e.g., Section 1, column 2, last paragraph, lines 1-3. Kelly fails to disclose, or even suggest, that the routers within the network are "on the network path" of the first network element and the second network element, as presently recited. Moreover, Kelly merely discloses that there are routers within the network, however, nowhere does Kelly disclose, or even suggest, "determining, at at least one intermediate network element on the network path, at least one flow rate associated with a plurality of packets," as presently claimed.

Also, the Examiner asserts, and Applicant agrees, that Kelly fails to disclose, or even suggest, "encoding at least two predetermined bits in the at least one probe packet based at least in part upon the at least one flow rate," as presently claimed. However, the Examiner alleges that Jacobs teaches such claimed limitation. Applicant respectfully disagrees. In contrast, Jacobs discloses "bits 7 and 6 of the IP header are used to as flags respectively for CE (congestion experience), ECT (ECN capable transport)." See, e.g., paragraph [0026]. Thus, Jacobs merely discloses that only bit 7 of the IP header is used to flag for CE (congestion experience) and that bit 6 of the IP header is used to flag for ECT (ECN capable transport). Therefore, bit 6 of the IP header is used to indicate whether participants in a session are ECN-capable (e.g., act either as receivers which signal back receipt of a notification, or as senders that respond to receipt of a signal from a receiver). See, e.g., paragraph [0012]. In addition, Jacobs discloses with respect to Figure 5b that "if router A experiences congestion, then, in the data flow directed to the customer terminals, the router sets the CE bit in some randomly chosen RTP data packets from the data stream before forwarding them to the customer terminals." See, e.g., paragraph [0026]. Therefore, as illustrated in Figure 5b of Jacobs, only bit 7 indicates congestion, while bit 6 indicates that sender and receiver are ECN capable transports. Thus, Applicant respectfully submits that Jacobs merely discloses a single bit to indicate congestion along a given path or link in a path and fails to disclose, or even suggest, "encoding at least two predetermined bits in the at least one probe packet based at least in part upon the at least one flow rate," as presently claimed.

Further, the Examiner asserts that Jacobs discloses "controlling an admission of additional packets into the network based at least in part on the encoding of the at least two predetermined bits in the at least one probe packet," as presently claimed. Applicant respectfully disagrees. In contrast, Jacobs merely discloses that "at the data source, in response to the congestion notification contained in the said control packet, reducing the loading network resources by the said data source." See, e.g., paragraph [0007]. Thus, the data source of Jacobs merely controls a transfer/uploading rate at the data source and fails to disclose "controlling an admission of additional packets," as presently claimed.

Further, the Examiner asserts, but Applicant disagrees, that one skilled in the art would have been motivated to incorporate the teaching of Jacobs within Kelly so as to improve

and enhance overall network bandwidth efficiency and performance by reducing packet loss and retransmission by maintaining proper congestion levels within a communications network. In particular, Applicant respectfully submits that Jacobs teaches away from Kelly. As stated in MPEP § 2141.02, a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. W.L. Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). As confirmed in MPEP § 2145, it is improper to combine references where the references teach away from their combination. In re Grasselli, 713 F.2d 731 (Fed. Cir. 1983). Specifically, Kelly calculates congestion by determining whether a final marking proportion exceeds a threshold level. In contrast, Jacobs determines congestion via a bit in the IP header of a data packet. Therefore, one having ordinary skill in the art would not use the bit in the IP header of the data packet of Jacobs to determine whether the final marking proportion exceeds the threshold level of Kelly.

In view of the foregoing, it is respectfully submitted that claim 1 is allowable over Kelly in view of Jacobs.

Regarding claims 2-16, 18-20, and 22, these claims are dependent upon independent claim 1. Thus, since independent claim 1 should be allowable as discussed above, claims 2-16, 18-20, and 22 should also be allowable at least by virtue of their dependency on independent claim 1. Moreover, these claims recite additional features which are not disclosed, or even suggested, by the cited references taken either alone or in combination.

Regarding claim 23, this claim recites subject matter related to claim 1. Thus, the arguments set forth above with respect to claim 1 are equally applicable to claim 23. Accordingly, it is respectfully submitted that claim 23 is allowable over Kelly in view of Jacobs for the same reasons as set forth above with respect to claim 1.

## II. CONCLUSION

In view of the foregoing, it is respectfully submitted that the rejections of claims 1-16, 18-20, 22 and 23 are in error. Accordingly, for the foregoing reasons, Applicant requests an appeal conference be convened so as to advise Applicant whether the Office will: 1) allow the present claims; 2) reopen prosecution and issue a new office action; or 3) allow this case to proceed to appeal.

To the extent necessary, a petition for an extension of time under 37 CFR § 1.136 is hereby made.

Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account No. 50-0206, and please credit any excess fees to the same deposit account.

Respectfully submitted,

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